92-1180

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES DANIEL GOOD REAL PROPERTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the seizure of the respondent real property for forfeiture, pursuant to a warrant issued by a magistrate judge based on a finding of probable cause, violated the Due Process Clause of the Fifth Amendment because the owner (who did not reside on the premises) was not given notice and an opportunity for a hearing prior to the seizure.

2. Whether a civil action under 21 U.S.C. 881(a)(7) for forfeiture of property used in the commission of a drug offense can be statutorily time-barred even if it is filed within the five-year statute of limitations in 19 U.S.C. 1621.

PARTIES TO THE PROCEEDING

The petitioner in this civil forfeiture action is the United States of America. The respondent is the parcel of real property that is the subject of the forfeiture action. James Daniel Good, the owner of the property, filed a claim and participated in the proceedings below.

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JAMES DANIEL GOOD REAL PROPERTY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as amended on denial of rehearing (App., *infra*, 1a-17a), is reported at 971 F.2d 1376. The opinions of the district court (App., *infra*, 18a-22a, 23a-33a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. A petition for rehearing was denied on September 10, 1992. App., *infra*, 2a. On November 25, 1992, Justice O'Connor extended the time within which to

file a petition for a writ of certiorari to and including January 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, the Due Process Clause of the Fifth Amendment, 21 U.S.C. 881, and 19 U.S.C. 1600-1610 and 1621 are reproduced at App., *infra,* 34a-49a.

STATEMENT

1. On January 31, 1985, state law enforcement officers executed a warrant authorizing the search of the respondent real property, owned by James Daniel Good. That search uncovered 89 pounds of marijuana, marijuana seeds, vials containing hashish oil, drug paraphernalia, and more than $7000 in United States currency. On July 3, 1985, Good pleaded guilty to one count of promoting a harmful drug in the second degree, in violation of Hawaii Revised Statutes § 712-1245(1)(b) (1989). He was sentenced to one year's imprisonment, a period of community service, and a $1000 fine, and he forfeited $3187 in cash found on the premises. App., *infra,* 3a, 23a; C.R. 45, Exh. B (findings of fact and conclusions of law in state forfeiture proceedings).[1]

2. On August 8, 1989, the United States filed this in rem action in the United States District Court for the District of Hawaii, seeking forfeiture of the property under 21 U.S.C. 881(a)(7) on the ground that it had been used to commit or facilitate commission of a federal drug offense. On August 18, 1989, a United States Magistrate Judge signed a warrant authorizing seizure of the property. The warrant was based upon an affidavit of Special Agent Robert Aiu of the Drug Enforcement Administration, which relied on the evidence seized during the January 1985 search of the premises by state police and on Good's guilty plea. App., *infra,* 3a; C.R. 29, Exh. F.

[1] "C.R." refers to the Clerk's Record filed in the court of appeals.

The property was seized on August 21, 1989, pursuant to the warrant. Good was living in Nicaragua at the time, and the house was occupied by tenants. The tenants were permitted to remain on the premises, but were directed to pay their rent to the government. App., *infra,* 24a. On October 18, 1989, Good filed a verified claim to the property and an answer to the complaint. C.R. 9, 10.

In an order dated September 11, 1990, App., *infra,* 23a-33a, the district court rejected Good's contention that the forfeiture action was not timely filed. *Id.* at 28a-30a. It pointed out that by virtue of 21 U.S.C. 881(d), forfeiture proceedings based on violations of the federal drug laws are governed by the procedures under the customs laws. App., *infra,* 29a. The applicable statute of limitations under the latter laws, 19 U.S.C. 1621, provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." The instant forfeiture action is timely, the court concluded, because it was filed less than five years after the search of the premises on January 31, 1985, which uncovered the evidence on which the forfeiture is based. App., *infra,* 30a. The district court also held that the seizure of the property without prior notice to Good and an opportunity to be heard did not violate the Due Process Clause. *Id.* at 33a.

In a subsequent order dated September 26, 1990, the district court granted the United States' motion for summary judgment. App., *infra,* 18a-22a. It first rejected

Good's argument that the state warrant authorizing the 1985 search was not supported by probable cause, and that the evidence seized during that search therefore should be excluded in these forfeiture proceedings. *Id.* at 19a-21a. The court found a number of indicia that the confidential informants on whom the State relied were reliable, including their apparently recent observation of a "large scale marijuana operation" on the premises and the likelihood that the instrumentalities of that operation would remain there for long periods of time. *Id.* at 20a-21a.

The court then concluded, "based on the recovery of substantial amounts of drugs and drug instrumentalities," that the United States had established probable cause that the property was used to facilitate a violation of 21 U.S.C. 841, and was therefore subject to forfeiture. App., *infra,* 21a. The burden accordingly shifted to Good to show by a preponderance of the evidence that the property was not subject to forfeiture, 19 U.S.C. 1615, by demonstrating either (1) that the property was not used for an unlawful purpose, or (2) that he was an innocent owner within the meaning of 21 U.S.C. 881(a)(7). The court found that Good had failed to carry that burden, noting that it was "satisfied that the [respondent] property was used for illegal purposes based on the drugs and drug instrumentalities located within the property," and that Good had offered no evidence of innocent ownership. App., *infra,* 21a-22a. The court therefore declared the property forfeited to the United States. *Id.* at 22a.

3. The court of appeals affirmed in part and reversed in part, and remanded for further proceedings. App., *infra,* 1a-17a.

a. Over Judge Noonan's dissent, the court of appeals first held that the district court had erred in finding the action timely because it was brought within the five-year limitations period in 19 U.S.C. 1621. App., *infra,* 4a-12a.

The court of appeals accepted Good's argument that 19 U.S.C. 1621 only establishes an "outer limit" for filing a forfeiture action, and that further limits are imposed by 19 U.S.C. 1602-1604. App., *infra,* 5a. Those provisions, the court explained, impose a "series of internal notification and reporting requirements," under which "customs agents must report to customs officers, *see* 19 U.S.C. § 1602, customs officers must report to the United States attorney, *see* 19 U.S.C. § 1603, and the Attorney General must 'immediately' and 'forthwith' bring a forfeiture action if he believes that one is warranted, *see* 19 U.S.C. § 1604." App., *infra,* 5a. In the court's view, the reporting duties under 19 U.S.C. 1602-1604 are made applicable to DEA and FBI agents in the present setting by 21 U.S.C. 881(d), because those agents are designated to seize property subject to forfeiture under the Controlled Substances Act. App., *infra,* 11a (quoting 21 C.F.R. 1316.72).

The court of appeals rejected the government's contention that the duties stated in 19 U.S.C. 1602-1604 to act promptly apply only where the property has already been seized, and therefore were inapplicable in this case because the respondent property was not seized until after the forfeiture action was commenced. The court pointed out that 19 U.S.C. 1602 and 1603 refer to the discovery of violations of the law as well as seizures of property, and it reasoned that the duty of customs officers (and therefore of DEA and FBI agents) to report promptly to the Attorney General is triggered in both situations. App., *infra,* 7a-11a. The court accordingly remanded for the district court to determine when Special Agent Aiu or any other DEA Agent obtained actual knowledge of the alleged offense. *Id.* at 11a-12a.[2]

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[2] The court of appeals concluded that the presence of an IRS agent when state police searched the premises in 1985 did not trigger the

Judge Noonan dissented on the limitations issue, expressing the view that the majority "has converted a set of housekeeping rules for the government into statutory protection for the property of malefactors." App., *infra,* 17a. He reasoned that once property has been used in the commission of a narcotics offense, it is subject to forfeiture. It followed that "[t]he government is free to claim the forfeiture any time after the offense is discovered. The only relevant restriction is the statute of limitations, which bars suit five years after the time of discovery." *Ibid.* In Judge Noonan's view, the majority's opinion not only, "in effect, creates a new statute of limitations," but "also provides a new construction of a statute that has been in existence for almost seventy years and has been applied in a variety of contexts to customs offenses without any court ever giving the statute the application given in this case." *Ibid.*

b. The court of appeals further held that the seizure of the premises without giving Good prior notice and an opportunity for a hearing violated his due process rights. App., *infra,* 12a-16a. The court recognized that the Ninth Circuit previously had held that property subject to forfeiture may be seized without prior judicial review. But it distinguished those cases on the ground that all except one involved personal property that could be removed from the jurisdiction, and that in the one exception, *United States* v. *Tax Lot 1500,* 861 F.2d 232 (1988), cert. denied, 493 U.S. 954 (9th Cir. 1989), the court did not (in the view of the panel here) resolve the question whether due process requires prior notice and opportunity for a hearing in connection with the seizure of real property for forfeiture. App., *infra,* 12a-13a.

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reporting duty the court found under 19 U.S.C. 1602 and 1603, because IRS agents were neither authorized to seize property nor bound to report the alleged offense. App., *infra,* 11a-12a.

With its own precedents thus put to one side, the court of appeals noted that *Mathews* v. *Eldridge,* 424 U.S. 319, 335 (1976), had identified a number of factors relevant to a due process analysis, including the significance of the property interest, the risk of erroneous deprivation, the probable value of additional procedures, and the governmental interests at stake. App., *infra,* 13a-14a. It also noted that, under *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), due process ordinarily requires notice and an opportunity to be heard prior to a deprivation of property and that exceptions to that rule are warranted only in "extraordinary situations," often characterized by "a special need for very prompt action." App., *infra,* 14a (quoting 407 U.S. at 91). The court found no such circumstances here. App., *infra,* 14a-16a.

The court of appeals recognized that extraordinary circumstances were found in *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), which held that notice and an opportunity to be heard were not required prior to seizure of a yacht for forfeiture. But it distinguished *Calero-Toledo* on the ground that the seizure there was of personal property. App., *infra,* 14a. In the court of appeals' view, "real property is distinct from personal property" for due process purposes, because the fact that real property cannot be moved eliminates the *Fuentes* factor of a need for "very prompt action." *Ibid.* Although Good was not occupying the respondent property in this case as his home (see page 3, *supra*), the court also relied on the notion that forfeiture of a person's home has implications for the balancing of factors under *Mathews* v. *Eldridge,* because "[p]eople have a particularly strong interest in their homes, and the government has a less significant interest in seeking forfeiture prior to giving notice and an opportunity to be heard." App., *infra,* 15a.

The court of appeals acknowledged that its finding of a due process violation in these circumstances conflicts with the Eleventh Circuit's decision in *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 632 (1986), which reached the "opposite conclusion." App., *infra*, 15a. The court believed, however, that its holding was supported by *United States* v. *Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (2d Cir. 1989), which also involved the seizure of a personal residence. App., *infra*, 15a.[3]

REASONS FOR GRANTING THE PETITION

This case presents two important issues under the federal forfeiture laws, and the court of appeals seriously erred in its disposition of each. The Due Process Clause does not require notice and an opportunity for a hearing before property is seized for forfeiture, especially where, as here, the seizure was made pursuant to a warrant issued by a neutral and detached magistrate on the basis of probable cause. There is a square circuit conflict on this issue of recurring importance, and it warrants resolution by this Court. The court of appeals also erred in holding that 19 U.S.C. 1602-1604 confer a right on a claimant to have a forfeiture action dismissed—even if it was brought within the five-year statute of limitations, and even if there has

[3] Although the court of appeals found a due process violation, it concluded that the violation need not invalidate the forfeiture (assuming that the district court finds on remand that the filing of this forfeiture action was timely). That is so, the court reasoned, because "[t]he 'mere fact of the illegal seizure, standing alone, does not immunize the [seized] goods from forfeiture.'" App., *infra*, 16a (quoting *United States* v. *One 1971 Harley-Davidson Motorcycle*, 508 F.2d 351 (9th Cir. 1974)). The court nevertheless held, without elaboration, that Good is entitled to the rents the United States collected from the tenants following the seizure. App., *infra*, 16a.

been no seizure of the claimant's property and the claimant has shown no prejudice—if government officials did not act with sufficient dispatch in carrying out what the court itself characterized as "internal" reporting and suit-filing duties under those statutory provisions. This ruling by the court below cannot be reconciled with this Court's holding in *United States* v. *$8850*, 461 U.S. 555, 563 n.13 (1983), that the same statutory scheme does not impose a privately enforceable filing deadline short of the five-year statute of limitations in 19 U.S.C. 1621. It also threatens to disrupt the orderly investigation of alleged violations of federal law. Accordingly, the limitations issue likewise warrants review.

1. The court of appeals erred in holding that the seizure of the respondent property pursuant to a warrant based on a magistrate's finding of probable cause violated the Due Process Clause of the Fifth Amendment because Good was not given notice and an opportunity to be heard prior to the seizure. Under 21 U.S.C. 881(b), the government is expressly authorized to request issuance of a warrant authorizing seizure of property subject to forfeiture "in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure." The government followed that procedure in this case, seeking a warrant based on an ex parte showing of probable cause, as provided in Fed. R. Crim. P. 41. The decision of the court of appeals, however, effectively holds the statutory authorization for seizures pursuant to a warrant unconstitutional as applied to seizure of a house.

Moreover, the decision below squarely conflicts with the Eleventh Circuit's decision in *United States* v. *A Single Family Residence & Real Property Located at 900 Rio Vista Blvd.*, 803 F.2d 625, 631-632 (1986), which held that due process permits the seizure of a residence even without a warrant. See also *United States* v. *Property Located at 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1561-1562 (11th

Cir. 1988). By contrast, other courts, agreeing with the Ninth Circuit in this case, have held that notice and opportunity for a hearing are required prior to seizure of a residence. See *United States* v. *Property at 4492 S. Livonia Rd.*, 889 F.2d 1258 (1989), reh'g denied, 897 F.2d 659 (2d Cir. 1990); *United States* v. *A Parcel of Land, Appurtenances, and Improvements, Known as 92 Buena Vista Ave.*, 937 F.2d 98, 101 (3d Cir. 1991) (dicta), cert. granted on other issues, No. 91-781 (argued Oct. 13, 1992).[4] The Court should resolve the circuit conflict on this constitutional issue of recurring importance.

a. As an initial matter, the court of appeals did not state what sort of hearing is required before a house (and the land to which it is appurtenant) may be seized for forfeiture. Nor did the court state what legal issue must be decided at the hearing—*i.e.*, whether the hearing is to be on the issue of probable cause (or some similar interlocutory showing of a likelihood of success on the merits), or whether the government is barred from seizing the property until it obtains a final judgment of forfeiture. Presumably, the court intended only the former. The Fourth Amendment certainly suggests that no more is required. It states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Fourth Amendment only protects against *unreasonable* seizures of property, and indicates that where, as

[4] Cf. *Richmond Tenants Org.* v. *Kemp*, 956 F.2d 1300 (4th Cir. 1992) (notice and hearing required prior to eviction of public housing tenant in connection with seizure for forfeiture of leasehold interest).

here, the seizure is pursuant to a warrant based upon probable cause, it is, by definition, reasonable for purposes of the Fourth Amendment. Because the Fourth Amendment specifically regulates the seizure of property by the government for law enforcement purposes, it, rather than the Fifth Amendment's Due Process Clause, should be the point of reference in determining the lawfulness of a seizure in the forfeiture context. Compare *Graham* v. *Connor*, 490 U.S. 386, 394-395 (1989) (Fourth Amendment, rather than Due Process Clause, is source of limitations on use of force in seizing person).

The decision in *United States* v. *Monsanto*, 491 U.S. 600 (1989), also supports the conclusion that no more than probable cause was necessary in order to permit the seizure in this case. *Monsanto* sustained the validity of a pretrial order in a criminal case that barred the defendant from transferring his property (including a home and apartment) prior to trial. The Court explicitly held "that assets in a defendant's possession may be restrained in the way they were here based on a finding of probable cause to believe that the assets are forfeitable." 491 U.S. at 615. The Court explained that it had "previously permitted the Government to seize property based on a finding of probable cause to believe that the property will ultimately be proved forfeitable" (*ibid.*, citing *United States* v. *$8850*, 461 U.S. 555 (1983), and *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974)), and that "[h]ere, where respondent was not ousted from his property, but merely restrained from disposing of it, the governmental intrusion was even less severe than those permitted by our prior decisions." *Ibid.* "Indeed," the Court continued, "it would be odd to conclude that the Government may not restrain property, such as the home and apartment in respondent's possession, based on a finding of probable cause, when we have held that (under appropriate circumstances), the

Government may restrain *persons* where there is a finding of probable cause to believe that the accused has committed a serious offense." 491 U.S. at 615-616 (citing *United States* v. *Salerno*, 481 U.S. 739 (1987)). The Court concluded that the property could be subject to a similar pretrial restraint to assure its "appearance" at trial and to "protect the community's interest in full recovery of any ill-gotten gains." 491 U.S. at 616.[5]

b. The Court in *Monsanto* observed in a footnote that it did not have to consider whether the Due Process Clause requires a hearing before a pretrial restraining order may be imposed, since the Second Circuit had ordered that such a hearing be held and the district court had already conducted the hearing. 491 U.S. at 615 n.10. It would, however, be a considerable departure from historical practice to require an adversarial hearing on the question of probable cause to support a warrant. Warrants authorizing the search and seizure of property have traditionally been based on an ex parte showing of probable cause. The text of the Fourth Amendment validates that practice, for it requires only that probable cause be "supported by Oath or affirmation." See *Franks* v. *Delaware*, 438 U.S. 154, 164-169, 171 (1978).

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[5] As the Second Circuit recognized in *Livonia Road*, 889 F.2d at 1267-1268, the government makes out a prima facie case of forfeiture in a civil forfeiture proceeding by establishing probable cause, and it may do so on the basis of an affidavit such as that submitted by the DEA agent in this case. See 19 U.S.C. 1615. Thus, the submission to the magistrate in this case not only established sufficient grounds for issuance of the warrant for seizure of the property pending entry of final judgment; it also made out a prima facie case on the *merits* and entitled the United States to a final judgment of forfeiture unless Good carried his burden of rebutting the showing or establishing the innocent owner defense, which he failed to do. See page 4, *supra*.

There is no reason for a different result here. As the Second Circuit pointed out in *Livonia Road*, the Court has applied the Warrant Clause of the Fourth Amendment with particular firmness in the context of the search of a house. See 889 F.2d at 1264 (citing *Payton* v. *New York*, 445 U.S. 573, 590 (1980), and *United States* v. *Karo*, 468 U.S. 705, 714 (1984)).[6] But nothing in the Fourth Amendment suggests that something *beyond* the usual warrant practice—issuance of a warrant by a neutral and detached magistrate, based on a showing of probable cause—is required for the search or seizure of a house. Indeed, the first portion of the Fourth Amendment speaks of the people's right to be secure in their "houses" in the same terms as their right to be secure in their "persons, * * * papers, and effects." Because the Fourth Amendment specifically addresses the subject of the seizure of persons and property for law-enforcement purposes, the courts should be reluctant to impose additional procedural requirements through the Due Process Clause.

c. In *Calero-Toledo*, the Supreme Court rejected the contention that due process required notice and an opportunity for a hearing prior to the seizure of a yacht that allegedly was used to transport drugs.[7] The Court relied

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[6] Indeed, the Second Circuit has declined to apply *Livonia Road* to the seizure of rental or commercial property. *United States* v. *141st Street Corp.*, 911 F.2d 870, 874-876 (1990), cert. denied, 111 S. Ct. 1017 (1991). Under the Second Circuit's view in the *141st Street* decision, *Livonia Road* should not apply here, because Good no longer used the house as his personal residence at the time of the seizure; he had rented it out. But cf. *United States* v. *All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896 (2d Cir. 1992) (following *Livonia Road* in connection with seizure of business premises where seizure resulted in destruction of business).

[7] In *Calero-Toledo*, the seizure was not made pursuant to a warrant, and the Court stated that it had "no occasion to address * * * whether the Fourth Amendment warrant or probable-cause requirements are

on three considerations: (1) the seizure served significant governmental interests, because it permitted the government to assert in rem jurisdiction over the property in forfeiture proceedings, and thereby fostered the public interest in preventing further illicit use of the property and enforcing the drug laws; (2) "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized—as here, a yacht—will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given"; and (3) unlike in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the seizure was initiated not by self-interested private parties, but by government officials. 416 U.S. at 679.[8]

The court of appeals sought to distinguish the instant case from *Calero-Toledo*—and held that pre-seizure notice and an adversarial hearing were required—on the basis of its belief that the second of the three factors identified in *Calero-Toledo* is inapplicable to real property, which cannot be moved. App., *infra*, 14a-15a. This analysis is flawed.

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applicable to seizures under the Puerto Rican statutes." 416 U.S. at 680 n.14. Similarly here, because the seizure was made pursuant to a warrant issued on the basis of a finding of probable cause, there is no occasion to determine whether (and, if so, to what extent) the Fourth Amendment's probable-cause and warrant requirements apply in the forfeiture setting.

[8] As the Court also noted in *Calero-Toledo*, 416 U.S. at 679 n.14, *Fuentes* itself had distinguished a seizure under a search warrant from a seizure under a writ of replevin, on the grounds (1) that a search warrant is generally issued to serve highly important governmental needs and is generally issued in situations demanding prompt action, and (2) that the Fourth Amendment guarantees that the government will not relinquish control over seizures to private parties and that a warrant will not issue except upon probable cause. See 407 U.S. at 93 n.30.

The Court did not state in *Calero-Toledo* that each of the three factors it identified is invariably a necessary condition for a seizure without prior notice and hearing to be constitutional, as the court of appeals seemed to believe. The Court simply identified the considerations it found relevant. Moreover, even as regards the second factor, on which the court below relied, the Court stated only that the property seized will "often" be of a sort that could be removed, destroyed, or concealed; thus, the Court was addressing property subject to forfeiture on a categorical basis, and did not seem to regard it as essential that the particular property at issue in a given case be shown to be capable of being (or likely to be) removed, destroyed, or concealed. And even though real property cannot be removed or concealed, a house or other structure on the property could be destroyed or damaged by an owner who had advance warning. Other governmental interests also weigh against a special rule for real property, including the possibility of danger to the seizing agents if the owner or occupant of the premises is tipped off in advance, and the owner's use of the hearing contemplated by the court below to obtain discovery (including disclosure of the identity of informants) in a parallel criminal investigation or prosecution that may be underway at the same time.

It also is significant that in *Calero-Toledo*, both the owner and the lessee were entirely dispossessed of the yacht during the forfeiture proceedings. Here, by contrast, Good's tenants were permitted to remain on the premises, just as they did prior to the seizure, with the rents to be paid to and held by the government pending the outcome of the forfeiture proceedings. Because the Fifth Amendment states that "[n]o person shall * * * be deprived of * * * property, without due process of law," the limited nature of the deprivation is relevant in deciding what process is due. Accordingly, the fact that the exigency justifi-

cation might generally have less force in the real property context is offest by the fact that the deprivation in this case was far less substantial than that in *Calero-Toledo*.

The conclusion that *Calero-Toledo* addresses seizures of property for forfeiture purposes on a categorical basis also is supported by the Court's subsequent decisions in *$8850* and *United States* v. *Von Neumann*, 474 U.S. 242 (1986). In *$8850*, the claimant conceded that the government was not constitutionally required to afford her an opportunity for a hearing before it seized the property for forfeiture under the customs laws. 461 U.S. at 562. The Court observed in a footnote that the general rule is that in the absence of an "extraordinary situation," a party may not invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified. But, significantly, the Court stated that it "ha[d] previously held that such an extraordinary situation exists when the government seizes items subject to forfeiture." 461 U.S. at 562 n.12 (citing *Calero-Toledo*). This statement is written in categorical terms: it does not say that the requisite extraordinary situation "may exist" when the government seizes property for forfeiture; it says that such a situation "exists." The Court then continued by stating that *Calero-Toledo* "clearly indicates that due process does not require federal customs officials to conduct a hearing before seizing items subject to forfeiture," and that the governmental interests found decisive in *Calero-Toledo*—including that "pre-seizure notice might frustrate the statutory purpose"—were equally present in the customs setting. *Ibid.* The Court reiterated this point in *Von Neumann*. 474 U.S. at 249 n.7. Although the property at issue in both *$8850* and *Von Neumann* was moveable, the Court did not rely on or even mention that fact in its discussion of the pre-seizure due process issue.

d. Finally, the seizure of property for in rem forfeiture on the basis of an ex parte finding of probable cause compares favorably with procedures governing the seizure of a person. An individual is not entitled to an adversarial hearing on the legitimacy of the seizure before it is effectuated, although he may thereafter be released on bail pending the criminal trial itself. See *Baker* v. *McCollan*, 443 U.S. 137, 142-143 (1979). As the Court noted in *Monsanto*, if such procedures are adequate for seizures of the person, which implicate the fundamental interest in liberty, then parallel procedures should be adequate for seizures of property. Compare *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (sustaining statute providing for suspension of bank director upon grand jury's finding of probable cause). The parallel here is close. The property was seized pursuant to a warrant on the basis of probable cause, but it was "released" to Good's tenants pending trial of the forfeiture action.[9] The parallel is further supported by the fact that, as the Court explained in *Calero-Toledo*, in forfeiture proceedings, the property itself is the defendant because the property itself was the wrongdoer; the defendant property therefore should also be subject to seizure on the basis of probable cause. The arrangement with the tenants served the same purpose as bail—namely, to regulate custody of the defendant pending trial and to secure the presence of the defendant at trial.

A prior hearing would have served no purpose in this case in any event. Good had pleaded guilty in state court to a drug offense, and the basis for the seizure and forfeiture was a statement of the evidence seized from the house by state law enforcement officials during the search

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[9] See also *$8850*, 461 U.S. at 569 (discussing ways in which claimant may obtain hearing after seizure).

that led to the state prosecution. For this reason, the court of appeals' apparent view that the historical practice of issuing a warrant on the basis of an ex parte showing of probable cause presents an unacceptable risk of an erroneous deprivation, see App., *infra,* 13a-14a, rings especially hollow in this case.

2. The court of appeals also erred in imposing a "promptness" obligation—judicially enforceable through the sanction of dismissal—on the institution of forfeiture proceedings, even where the five-year limitations period in 19 U.S.C. 1621 has been satisfied. The provisions of the customs laws on which the court of appeals relied in reaching that unprecedented result, 19 U.S.C. 1602-1604, impose internal obligations on government officials; they do not furnish a statutory basis for dismissal of a forfeiture action. The court of appeals' ruling to the contrary is inconsistent with this Court's disposition of the statute-of-limitations issue in *$8850*, and it threatens uncertainty and disruption in the investigation of violations of federal laws. Review of this issue is therefore warranted as well.

a. The customs laws (which are incorporated by reference into 21 U.S.C. 881) furnish protection to private persons from undue delay by the government in instituting forfeiture proceedings in the usual manner in which the law affords protection against stale claims—through a statute of limitations. See *United States* v. *Lovasco,* 431 U.S. 783, 788-789 (1977). Thus, 19 U.S.C. 1621 provides that "[n]o suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." This statute of limitations unquestionably confers an enforceable right on a person claiming an ownership interest in property against which the United

States has brought a forfeiture action, and it may be pleaded by the claimant as an affirmative defense in answering the government's forfeiture complaint. See Fed. R. Civ. P. 8(c).

There is no reason to believe that Congress intended 19 U.S.C. 1602-1604 to confer an additional right on a claimant to have a forfeiture action dismissed, even where the action was brought within the five-year limitations period under 19 U.S.C. 1621. Rather, as the court of appeals itself stated, those provisions "establish a series of *internal* notification and reporting requirements," under which "customs agents must report to cutsoms officers, *see* 19 U.S.C. § 1602, customs officers must report to the United States attorney, *see* 19 U.S.C. § 1603, and the Attorney General must 'immediately' and 'forthwith' bring a forfeiture action if he believes that one is warranted, *see* 19 U.S.C. § 1604." App., *infra,* 5a (emphasis added). Especially when juxtaposed against the limitation imposed by 19 U.S.C. 1621 for the benefit of property owners and other private persons, the most natural reading of the quite different provisions in 19 U.S.C. 1602-1604 is that they are internal housekeeping measures designed to regulate (and promote expedition in) the conduct of government personnel for the benefit of the government.

That interpretation is supported by the background of the relevant statutory provisions. Language requiring customs officials to proceed "without delay" appears in statutes governing civil penalties for customs violations at least as early as 1799. See Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 695-696; *Stockwell* v. *United States,* 80 U.S. (13 Wall.) 531, 542-543 (1871). As one commentator has observed:

> The great antiquity of the language indicates that its purpose was not to protect "due process rights" that

were as yet undreamt, but rather to insure that federal customs revenues were collected in a timely fashion. This was absolutely essential because such duties "constituted the principal source of federal revenues from 1789 until World War I."

Since the purpose of the promptness language in sections 1602 and 1604 is to protect the fisc rather than claimants' due process rights, these statutes also do not provide claimants with a non-constitutional basis for raising a delay defense.

1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 12.01, at 12-27 to 12-28 (1992) (quoting *United States* v. *Laurenti*, 581 F.2d 37, 41 n.12 (2d Cir. 1978), cert. denied, 440 U.S. 958 (1979)).[10] It would be inconsistent with the purpose of promoting the government's financial interests to recognize a personal right in a claimant to require dismissal of the government's action to recover a forfeiture or penalty where the government's own agents did not move with sufficient dispatch on its behalf *within* the time allowed by the statute of limitations. Compare *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 716-722 (1990); *Brock* v. *Pierce County*, 476 U.S. 253 (1986).[11]

Furthermore, the language in 19 U.S.C. 1604 directing the Attorney General to cause proceedings to be instituted

[10] The Second Circuit held in *Laurenti* that 19 U.S.C. 1602-1604 do not furnish a basis for a court to dismiss an indictment based on delay between the time the government learned of the violation and the time the indictment was returned.

[11] See also *Air Courier Conf.* v. *American Postal Workers Union*, 111 S. Ct. 913 (1991); *Lujan* v. *National Wildlife Federation*, 110 S. Ct. 3177, 3186 (1990) ("[T]he failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute.").

"forthwith" and "without delay" is followed by language stating that he need not do so if he "decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises." Because this language assumes the continued existence of the Attorney General's discretion in enforcing the laws, it greatly undercuts the notion that 19 U.S.C. 1602-1604 circumscribe that discretion to the extent of imposing the severe sanction of dismissal. *Laurenti*, 581 F.2d at 43. If Congress had intended 19 U.S.C. 1602-1604 to constitute the equivalent of a speedy trial act, "one would suppose that Congress would have set some specific deadlines, as it did in the Speedy Trial Act itself. 18 U.S.C. § 3161-74. Here there are simply generalities—'immediately' to inquire, 'forthwith' to commence prosecution, to prosecute 'without delay.' " *Laurenti*, 581 F.2d at 43.

Finally, a construction of 19 U.S.C. 1602-1604 that supported dismissal of a forfeiture action would create incentives to investigate possible violations of the law with undue haste, to the disadvantage of both the property owner and the government. See *Laurenti*, 581 F.2d at 43-44; *United States* v. *Lovasco*, 431 U.S. at 793. That result would be especially unjustified where, as here, the property in question was not seized prior to commencement of the forfeiture proceedings, and the owner therefore suffered no prejudice and had no substantial countervailing equities during any period of pre-filing delay.

b. For the foregoing reasons, the text, structure, background and purposes of the customs laws weigh against the court of appeals' construction of 19 U.S.C. 1602-1604. But in addition, that construction cannot be reconciled with the disposition of the statutory timeliness issue by this Court in *$8850*.

In *$8850*, the Court announced a flexible four-part test (drawn by analogy from the speedy trial test under *Barker* v. *Wingo*, 407 U.S. 514 (1972)) for assessing the lawfulness under the Due Process Clause of delay between seizure of property and institution of judicial forfeiture proceedings. In doing so, however, the Court rejected the approach of *United States* v. *Thirty-seven Photographs*, 402 U.S. 363 (1971). In that case, the Court read time limits into a different statutory provision to ensure a prompt disposition of objections to the seizure of allegedly obscene materials, and thereby to avoid a substantial question concerning the constitutionality of the statutory scheme under the First Amendment. The Court reasoned in *$8850* that even if it "were inclined to interpret the statutes here in such a way as to avoid any due process question, it would be impossible to read into the statutory scheme, as we did in *Thirty-seven Photographs*, a short statute of limitations, since 19 U.S.C. § 1621 (1976 ed., Supp. V) expressly allows the Government to bring a civil forfeiture proceeding within five years." 461 U.S. at 563 n.13. The court of appeals' reading of a short (and vague) limitations period into 19 U.S.C. 1602-1604 cannot be reconciled with this holding in *$8850*.

The court of appeals sought to avoid the import of footnote 13 in *$8850* by labeling it mere "dicta" and by expressing the view that this Court "did not examine the effects of competing obligations under sections 1602-04." App., *infra*, 7a. The court was wrong on both counts. This Court elsewhere discussed the statutory framework created by 19 U.S.C. 1602-1604 (see 461 U.S. at 557-558 & n.3), and specifically considered in footnote 13 whether the "statutes" involved in the case (which included 19 U.S.C. 1602-1604) could be construed to avoid a due process problem by imposing a filing deadline shorter than the five years allowed by 19 U.S.C. 1621. The Court held that they

could not. If the Court had concluded otherwise, it could have avoided the constitutional issue, just as it had in *Thirty-seven Photographs*. Footnote 13 in *$8850* therefore cannot be dismissed either as mere dicta or as being unrelated to 19 U.S.C. 1602-1604. It follows that the decision below squarely conflicts with *$8850*.

c. Prior to *$8850*, some courts of appeals had followed the approach of *Thirty-seven Photographs* in cases governed by 19 U.S.C. 1602-1604 and dismissed forfeiture actions for failure to satisfy the promptness standards the courts found in those provisions, thereby avoiding the question of what limits the Due Process Clause imposes. See, *e.g.*, *United States* v. *Sarkisian*, 472 F.2d 468 (10th Cir.), cert. denied, 414 U.S. 976 (1973); *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146, 1151-1156 (4th Cir. 1974); *United States* v. *One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977); *United States* v. *One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 819 n.1 (9th Cir. 1981). Those decisions do not survive *$8850*, which makes clear that the Due Process Clause is the sole source of protection (aside from the five-year statute of limitations in 19 U.S.C. 1621) from delay prior to institution of forfeiture proceedings. The Ninth Circuit has now resurrected the discredited rationale that 19 U.S.C. 1602-1604 impose judicially enforceable limitations independent of the Due Process Clause.[12]

This case presented an especially inappropriate occasion for doing so. Prior cases under 19 U.S.C. 1602-1604 have

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[12] Indeed, the Ninth Circuit itself previously had recognized, after *$8850*, that those statutory provisions impose no enforceable standards independent of the Due Process Clause. See *United States* v. *Two Hundred Ninety-Five Ivory Carvings*, 726 F.2d 529, 531 (9th Cir. 1984) ("the prompt referral implicitly required by § 1603 is a referral no later than the time judicial proceedings must be instituted to comply with constitutional due process").

involved seizure of the property prior to institution of forfeiture proceedings. See, *e.g.*, cases cited at page 23, *supra*. In that situation, the owner is dispossessed of the property and may experience hardship or disadvantage as a result. It is a radical departure from prior understandings to construe 19 U.S.C. 1602-1604 to require (subject to the sanction of dismissal) "prompt" referral of possible violations to the Attorney General and institution of judicial proceedings "without delay" where there has been no such seizure. In that setting, 19 U.S.C. 1602-1604, as construed by the court below, would constitute a judicially enforceable directive to complete an investigation hastily, despite the absence of any prejudice to the owner. The Constitution imposes no such limitations,[13] and there is no reason to suppose that Congress intended to do so.[14]

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[13] See *Hoffa* v. *United States*, 385 U.S. 293, 310 (1966) ("[l]aw enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause"); *Lovasco*, 431 U.S. at 792 (due process imposes limits only on oppressive pre-indictment delay).

[14] By their terms, 19 U.S.C. 1602-1604 are directed primarily to the post-seizure situation. The requirement in 19 U.S.C. 1603(b) to report "promptly" to the United States Attorney where there has been a seizure or where a "violation of the customs laws is discovered"—on which the court of appeals relied, see App., *infra*, 9a—contains the further condition that "legal proceedings * * * in connection with such seizure or discovery are required." In the forfeiture context, legal proceedings are not "required" unless and until the property has been seized and administrative proceedings are either unavailable or have been completed. See 19 U.S.C. 1607, 1608. In the non-forfeiture context, legal proceedings likewise would not ordinarily be "required" following discovery of a violation of the law until after administrative proceedings for assessment of a penalty or for other purposes have been completed. See H.R. Rep. No. 621, 95th Cong., 1st Sess. 17 (1977) (explaining the purpose of the 1978 addition of "promptly" to the reporting requirement in 19 U.S.C. 1603 as being to ensure the availability of judicial review once administrative proceedings have been completed).

The Ninth Circuit's holding in this case that dismissal of the forfeiture proceeding nevertheless may be ordered based on "undue delay" is inconsistent with the Third Circuit's decision in *92 Buena Vista Avenue*. There, the court refused to order dismissal of a civil forfeiture action based on "undue delay" where, as here, the action was timely under the five-year limitations period in 19 U.S.C. 1621 and the property was not seized prior to institution of the forfeiture proceedings. 937 F.2d at 105.[15]

d. In light of the inconsistency between the decision below on the one hand and *$8850* and *92 Buena Vista Avenue* on the other—as well as the uncertainty and disruption the decision below threatens in the administration of various forfeiture programs and other law enforcement endeavors governed by 19 U.S.C. 1602-1604—review by this Court is warranted.

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[15] Although, as the court below pointed out (App., *infra*, 7a), the Third Circuit did not specifically discuss 19 U.S.C. 1602-1604, there is no reason to believe that the Third Circuit meant to exclude those statutory provisions from its consideration of the legal constraints on the government's actions in this setting.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JANUARY 1993

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-16636
D.C. No. CV-89-00612-HMF

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JAMES DANIEL GOOD PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE TITLE NO. 249, 207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEEAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Hawaii
Harold M. Fong, District Judge, Presiding

Argued and Submitted
December 11, 1991—San Francisco, California

Filed April 24, 1992
Amended September 10, 1992

ORDER AND AMENDED OPINION

Before: RUGGERO ALDISERT,* ALFRED T. GOODWIN, and JOHN T. NOONAN, JR., Circuit Judges.

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* Honorable Ruggero J. Aldisert, Senior Circuit Judge, Third Circuit, sitting by designation.

Opinion by Judge Goodwin; Dissent by Judge Noonan

ORDER

The opinion filed April 24, 1992, slip op. 4517 is amended as follows:

1. Slip op. at 4521, second paragraph, line 3: delete "On that same day," insert "On August 21, 1989,"

2. Slip op. at 4521, second paragraph, lines 9-10: delete "The actual seizure of Good's home occurred on August 21, 1989."

3. Slip op. at 4530, first paragraph, line 1: delete "warrant of arrest" insert "seizure warrant"

With the opinion thus amended, Judge Aldisert and Goodwin have voted to deny the petition for rehearing, Judge Noonan has voted to grant the petition for rehearing. Judges Aldisert and Goodwin have voted to recommend rejection of the suggestion for rehearing en banc, Judge Noonan has voted to accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

OPINION

GOODWIN, Circuit Judge:

This appeal challenges the civil forfeiture of a home pursuant to 21 U.S.C. § 881(a)(7),[1] the provision of the

[1] In 1984 Congress amended the Controlled Substance Act, Pub. L. 91-513, 84 Stat. 1242 (Oct. 27, 1970), to allow for the forfeiture of real proeprty. *See* Pub. L. 98-473, § 306(a), 98 Stat. 2050 (Oct. 12, 1984).

Controlled Substance Act that authorizes the forfeiture of real property. James Daniel Good challenged the forfeiture as untimely and as a violation of due process. The district court, exercising jurisdiction under 21 U.S.C. § 881(b), granted the government's motion for summary judgement. The district court found the action to be timely and in accordance with due process. Notice of Appeal was filed in compliance with Fed. R. App. P. 4(a). Our jurisdiction is based on 28 U.S.C. § 1291. We reverse and remand on the timing issue; we reverse on the due process question, finding that Good's rights were violated, and we affirm the district court in all other respects.

I.

On January 31, 1985, pursuant to a search warrant, Hawaii state police officer uncovered approximately 89 pounds of marijuana, marijuana seeds, vials containing hashish oil, and other drug paraphernalia. Good pleaded guilty on July 3, 1985 to promoting a harmful drug in violation of Hawaii Revised Statutes § 712-1245(1)(b). He served one year in jail and was placed on probation. He was also required in state court forfeiture action to surrender $3,187 in cash found on the premises.

Some four years later, on August 8, 1989, the United States filled the present action, seeking to forfeit Good's house and property pursuant to § 881(a)(7). On August 21, 1989, a Seizure Warrant directing U.S. Marshals to seize the defendant property was issued by a magistrate judge of the U.S. District Court of Hawaii. The affidavit in support of the seizure warrant was sworn by a DEA special agent and relied exclusively on evidence gathered in the January 31, 1985 state police search of Good's house.

Good filed a timely claim for the property. After discovery, in July 1990, Good filed a motion for summary

judgement and a motion for rents on the property collected by the government after the seizure. The government filed its own motion for summary judgement and moved to strike Good's claim. The district court denied Good's motions and granted the government's. This appeal followed.

II.

The United States sought forfeiture of Good's home four years after Good was convicted and sentenced on state drug charges and four and one half years after the underlying predicate acts occurred. Most of the forfeiture cases concerned with procedural and timing issues deal with lengthy delays between the initial seizure of property and the instigation of forfeiture proceedings. This case, however, is concerned with the effects of a lengthy delay between the underlying predicate acts and the initiation of forfeiture proceedings. The contention that the forfeiture was untimely involves the interpretation of statutes and is subject to review as a question of law. *Bunting v. United States*, 884 F.2d 1143, 1145 (9th Cir. 1989).

The Controlled Substance Act does not establish procedures to govern civil forfeiture, rather, section 881 incorporates the procedures outlined in the customs laws.

> The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter . . .

21 U.S.C. § 881(d). This court interprets 21 U.S.C. § 881 as incorporating the provisions "set forth in Title 19 of the

United States Code, sections 1602-21." *United States v. One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 819 (9th Cir. 1981).

Section 1621 of the customs laws provides the statute of limitations for initiating customs forfeiture and penalty proceedings. It reads in pertinent part:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered.

19 U.S.C. § 1621. The customs laws also outline specific obligations for customs agents and officers, as well as for U.S. attorneys and the Attorney General.

Good argues that the five year limitations period in section 1621 establishes an outer limit and that actions filed within the five year period may still be untimely if filed in violation of other relevant sections of the customs laws, *see* 19 U.S.C. §§ 1602-04.[2] These other provisions establish a series of internal notification and reporting requirements where customs agents must report to customs officers, *see* 19 U.S.C. § 1602, customs officers must report to the United States attorney, *see* 19 U.S.C. § 1603, and the Attorney General must "immediately" and "forthwith" bring a forfeiture action if he believes that one is warranted, *see* 19 U.S.C. § 1604.

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[2] Alternatively, Good asks us to adopt the reasoning of Judge Ferguson's concurring opinion in *United States v. Tax Lot 1500*, 861 F.2d 232, 236 (9th Cir. 1988) (Ferguson, J., concurring), *cert. denied*, 493 U.S. 954 (1989). Judge Ferguson argues that the language of 21 U.S.C. § 881(a)(7), the provision authorizing the forfeiture of real property, requires the prompt commencement of forfeiture proceedings. That issue was not properly before the court in *Tax Lot 1500* and we are not bound by the views of a concurring opinion. We are not persuaded by the argument and decline to make it a basis for our decision.

In *One 1971 BMW 4-Door Sedan* this court held that the mandates of sections 1602, 1603 and 1604 were applicable to 21 U.S.C. § 881 forfeitures. In that case, however, the Drug Enforcement Administration ("DEA") had already seized the property in question.

> Section 1602 impose[s] on the seizing officer a duty to report the seizure immediately to the appropriate DEA official; section 1603 require[s] the DEA official to report the seizure promptly to the appropriate United States Attorney for prosecution of the forfeiture and to include in that report a statement of all facts relevant to the seizure; and section 1604 require[s] the United States Attorney immediately upon receipt of that report to inquire into the facts of the case and the laws applicable thereto to determine "if it appears probable that . . . forfeiture has been incurred," and to institute proceedings "forthwith," unless, upon inquiry and examination, he decide[s] "that such proceedings probably cannot be sustained or that the ends of public justice do not require that they be instituted or prosecuted."

652 F.2d at 819-20.[3]

We have found no case which interprets the statute of limitations, section 1621, in light of the DEA's obligations under sections 1602-04. Some courts have applied the statute of limitations to various forfeiture actions without considering the possible limiting effects of sections 1602-04. The Third Circuit simply applied the five year rule in deciding that a forfeiture action initiated in 1989, based on predicate acts discovered in 1986, was not time

[3] In 1980 these provisions were amended to substitute "the Attorney General of the United States" and "the Attorney General" in the place of "United States attorney." *See* Pub. L. 96-417, 94 Stat. 1746 (Oct. 10, 1980). This amendment does not affect our analysis.

barred. *United States v. A Parcel of Land, Bldgs., App. & Imp.*, 937 F.2d 98, 105 (3rd Cir. 1991), *pet. for cert. pending*. The court found that there had been no undue delay, but was not asked to consider whether government officials complied with sections 1602-04. Similarly, two district courts have applied the five year rule without discussing the issue before this court. *See United States v. $116,000 in U.S. Currency*, 721 F. Supp. 701, 705 (D.N.J. 1989) (forfeiture action barred by § 1621); *United States v. 2401 S. Claremont*, 724 F. Supp. 670, 673 (W.D. Mo. 1989) (forfeiture action not barred by § 1621). The court in *2401 S. Claremont* relied on dicta found in a footnote of a Supreme Court opinion examining the due process implications of delaying the initiation of forfeiture proceedings once property has been seized. *See United States v. $8,850*, 461 U.S. 555, 563 n.13 (1983). The Court read section 1621 as creating a five year statute of limitations but, given that the issue was not before it, did not examine the effects of competing obligations under sections 1602-04. Finally, the First Circuit held that a ten month delay in initiating forfeiture proceedings was not unreasonable. *United States v. Land and Bldg. at 2 Burditt Street*, 924 F.2d 383, 385 (1st Cir. 1991). The court, however, also in dicta, expressed scepticism as to whether the government was free to initiate proceedings any time it chose within the five year period. *Id.*

The scope of the DEA's obligations under sections 1602-04 when there has not been a seizure of property and the relationship between these provisions and the statute of limitations, section 1621, are issues of first impression. The government contends that there is no conflict between the provisions because section 1604's mandate to the Attorney General applies only when property has been seized. According to this argument, nothing in sections 1602-04 pertain to the process or timing of the decision to

initiate forfeiture proceedings in the absence of seizure. The government concludes that it is free to seek forfeiture at any time within the five year statute of limitations.

Like any exercise in statutory interpretations, we begin by examining the language of the statute and assessing its plain meaning. *North Dakota v. United States,* 460 U.S. 300, 312 (1983); *United States v. Hurt,* 795 F.2d 765, 770 (9th Cir. 1986), cert. denied, 484 U.S. 816 (1987). Contrary to the government's assertion, the language of section 1604 does not restrict itself to situations where there has been a seizure of property.

> It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of *cases reported to him by customs officers* and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred *by reason of such violation,* for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture . . .

19 U.S.C. § 1604 (emphasis added). Rather than speaking in terms of seizure, the section refers to those "cases reported to him by customs officers" as well as fines, penalties and forfeitures incurred by "such violation[s]."

To understand the meaning of these terms, it is necessary to examine section 1604 in the context of the reporting requirements of sections 1602 and 1603. Section 1602 provides:

> It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise or baggage seized by him, *and to report immediately to such customs officer every violation of the customs laws.*

19 U.S.C. § 1602 (emphasis added). The duty of agents to report to their superiors is not limited to those instances where they have seized property.

Similarly, section 1603 requires:

> Whenever a seizure of merchandise for violation of the customs laws is made, *or a violation of the customs laws is discovered,* and legal proceedings by the United States attorney in connection with such seizure *or discovery* are required, it shall be the duty of the appropriate customs officer to report such seizure *or violation* to the United States attorney for the district *in which such violation has occurred,* or in which such seizure was made, and to include in such report a statement of the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. § 1603(b) (emphasis added).

While it is clear that these provisions encompass seizures, we hold that the substance of the procedures outlined in sections 1602-04 is not limited to those instances where seizure of property has already occurred. The same procedural requirements apply when government agents who are bound by these provisions learn of violations of the law that may subject property to forfeiture.

Interpreting sections 1602-04 to require prompt government action when FBI and DEA agents have knowledge of

violations of the law implicating forfeiture does not render the five year statute of limitations meaningless. Section 1621 is not phrased to extend the government the authority to seek forfeiture at anytime within a five year period. Section 1621 is phrased in the negative: "No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered." 19 U.S.C. § 1621. As the First Circuit has reasoned, this section provides "that a forfeiture action cannot be brought after a lapse of five years; not that forfeiture may be commenced at any time within five years." *Land and Building at 2 Burditt Street,* 924 F.2d at 385 (dicta). Our interpretation of sections 1602-04 and 1621 is consistent with the face of the statute.

Moreover, the statute of limitations incorporates a discovery rule, which has been interpreted to employ a "known or should have known standard." An offense is discovered "when a 'party discovers or possesses the means to discover the alleged wrong, whichever occurs first.' " *$116,000 in U.S. Currency,* 721 F. Supp. at 703-04 (quoting *United States v. R.I.T.A. Organics, Inc.,* 487 F. Supp. 75, 77-78 (N.D. Ill. 1980)). The requirements of sections 1602-04, on the other hand, are triggered when knowledge of the alleged violation actually exists. Finally, section 1621 is applicable to the United States government as a whole. The mandates of sections 1602-04 are much narrower. The expedited reporting and action requirements apply only to those federal officers authorized to seize property, and they are triggered only when actual knowledge of a violation of a law potentially justifying forfeiture exists.

The policy reasons cited by the government for pursuing civil forfeiture after the termination of criminal proceedings does not require a different outcome. The government can cite no policy interest for waiting for four years after the termination of criminal actions. Additionally, as the government acknowledges, governmental concerns can be accommodated by requesting a stay in the civil proceeding.

It remains to be determined how duties directed to customs agents and officials are to be translated in the context of 21 U.S.C. § 881 for the purposes of civil forfeiture under the Controlled Substance Act. Section 881(d) provides

> that such duties that are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

21 U.S.C. § 881(d). Federal regulations designate those officers who can make seizures under the Controlled Substance Act. "For the purpose of carrying out the Act, all special agents of the Drug Enforcement Administration and the Federal Bureau of Investigation are authorized and designated to seize such property as may be subject to seizure." *See* 21 C.F.R. § 1316.72. Given that FBI and DEA agents are authorized to seize property, these agents are also bound by the reporting obligations of sections 1602 and 1603. Their reports of seizures *and* violations of the law implicating potential forfeitures trigger the Attorney General's obligations under section 1604.

In the raid on Good's house, an IRS agent accompanied the local police. This agent was neither authorized to seize property nor bound to report the alleged offense. His

presence did not trigger any of the requirements of sections 1602-04. Robert Aiu, a special agent for the DEA, ultimately swore the 1989 affidavit in support of the seizure warrant. The government refused to answer interrogatories directed at determining when Aiu or any other DEA personnel obtained actual knowledge of the alleged offense. We cannot determine from the record before us when the government's obligations under sections 1602-04 were triggered. Consequently, the record does not reveal whether the government acted in a prompt and timely fashion in compliance with the statute.

The case is remanded to the district court to develop the factual record necessary for this determination.[4]

III.

Good's home was seized pursuant to a seizure warrant issued by a United States magistrate. There was no prior notice or opportunity for the property owner to be heard before the seizure of his home. 21 U.S.C. § 881 does not provide for such a hearing. Good argues that the statute is an unconstitutional violation of due process both on its face and as applied. The government cites a phalanx of Ninth Circuit opinions that uniformly support the proposition that items subject to forfeiture may be seized without prior judicial review. *See United States v. One 1985 Cadillac Seville,* 866 F.2d 1142 (9th Cir. 1989);

[4] The facts of this case illustrate how sections 1602-04 and 1621 continue to have separate and independent meanings. It can fairly be argued that the discovery rule under § 1621 was triggered at the time of the state police search, especially given the presence of the IRS agent. The five year statute of limitations began to run at this time. Analysis under sections 1602-04, however, involves a separate inquiry. These provisions are implicated only when DEA or FBI agents obtain knowledge of the offense.

United States v. One 1971 BMW 4-Door Sedan, 652 F.2d 817 (9th Cir. 1981); *United States v. One 1972 Mercedes Benz,* 545 F.2d 1233 (9th Cir. 1976); *United States v. Tax Lot 1500,* 861 F.2d 232 (9th Cir. 1988), *cert. denied,* 493 U.S. 954 (1989).

All of these case, save one, have one thing in common: the seized property can be driven away and could find itself in another jurisdiction by sundown. The exception is *Tax Lot 1500,* which involved the forfeiture of real property. The government urges us to rest our decision on this case. The problem with *Tax Lot 1500,* however, is that it was argued and submitted as an eighth amendment case, not as a due process case. Neither the due process arguments nor the record before the court were sufficiently developeed to support the broad proposition cited by the government that the absence of a pre-seizure hearing can never raise constitutional questions, even when real property is being forfeited. *Tax Lot 1500* specifically reserved the issue of a potential facial challenge to § 881 and confined its holding to the statute as applied. The court found that the process afforded "sufficiently cured any possible constitutional defect" *in that case. See* 861 F.2d at 236.

Tax Lot 1500 does not provide a general framework for analyzing the due process implications of forfeiting real property and is of little help in resolving the issue in the present case. For guidance, we turn to the Supreme Court's decisions in *Mathews v. Eldridge,* 424 U.S. 319 (1976), *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974), and *Fuentes v. Shevin,* 407 U.S. 67 (1972). *Mathews v. Eldridge* identifies a number of factors that should be considered in determining whether or not there has been a violation of due process. Courts are instructed to consider the significance of the property interest at stake, the risk of erroneous deprivations given the procedures actually used, as well as the probable value of

additional procedural safeguards, and, finally, the government't interest in pre-notice seizure. 424 U.S. at 335.

Fuentes teaches that due process requires notice and an opportunity to be heard prior to the deprivation of a property interest. 407 U.S. at 80-82. Exceptions to this rule are warranted only in "extraordinary situations." The second of three defining characteristics of such an extraordinary situations is when there is "a special need for very prompt action." 407 U.S. at 91.

Calero-Toledo applied the *Fuentes* criteria to civil forfeitures holding that an exception to the general rule of notice and an opportunity to be heard is warranted when the property being forfeited is a yacht. Central to the Court's analysis was the fact that the property in question was personal property and that it was movable. "[T]he property seized—as here, a yacht—will often be the sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given." 416 U.S. at 679. This case has been relied upon to establish the general proposition that due process does not require government officials to conduct hearings before seizing items of personal property that are subject to forfeiture.

Calero-Toledo, however, was decided before 21 U.S.C. § 881(a)(7) was adopted in 1984. Section 881(a)(7) made real property subject to civil forfeiture for the first time. We find that, for the purposes of due process analysis, real property is distinct from personal property. One of the unique aspects about a piece of land is that it cannot be easily moved, eliminating the *Fuentes* requirement for "very prompt action." The forfeiture of a person's home also has implications for the balance in *Mathews v. Eldridge*. People have a particularly strong interest in their homes, and the government has a less significant interest in seeking forfeiture prior to giving notice and an opportunity to be heard. The home will be there when the government decides to initiate forfeiture proceedings. The home will be there when the government delivers notice of its intent. Finally, the home will still be there for seizure if the government is successful on the merits of its action. These factors shift the balance struck in *Calero-Toledo* and in most instances will militate in favor of requiring a pre-seizure hearing before an individual's home can be taken.

The Second Circuit has grappled with the difficult issues raised by the seizure of a house. *See United States v. Property at 4492 S. Livonia Rd.,* 889 F.2d 1258 (2d Cir. 1989). In a well-reasoned opinion the court examined the factors identified in *Mathews v. Eldridge* and concluded that "under all the circumstances there were no exigent circumstances justifying the seizure of [the individual's] home when the forfeiture action was started." 88 F.2d at 1265. The court held that due process required the provision of a pre-seizure hearing. The Eleventh Circuit, in a cursory treatment of the question, has come to the opposite conclusion. *See United States v. A Single Family Residence,* 803 F.2d 625, 632 (11th Cir. 1986). We find the Second Circuit's analysis persuasive and reach a similar result.

Good has a substantial and unique interest in his home. The government's interest in avoiding a pre-seizure hearing is not significant in this case. The house is not going anywhere. It is not going to be "removed to another jurisdiction, destroyed or concealed." *Calero-Toledo,* 416 U.S. at 679. Any legitimate interest the government has may be protected through means less restrictive than seizure. "Any exigency that might be posed by threat of an encumbrance on, or transfer of, the property may be met by less restrictive means than seizure, for example, by the filing of a lis pendens . . . along with a restraining order or a bond requirement." *Livonia Road,* 889 F.2d at 1265. The gov-

ernment argues after a four and a half year delay that no pre-seizure hearing should be required because quick action was necessary. Government claims of urgency do not inspire confidence. The government does have a strong interest in seeing that the property is no longer used for illegal purposes, but this interest can be met through means less drastic than seizure of the real property. On the facts of this case we find that the statute, as applied, violated Good's rights to due process. Good was entitled to notice and an opportunity to be heard before his home was seized. We need not reach the facial challenge.

If on remand the district court finds the filing of this proceeding to be timely, the violation of Good's due process rights need not invalidate the forfeiture. The " 'mere fact of the illegal seizure, standing alone, does not immunize the [seized] goods from forfeiture.' " *United States v. One 1971 Harley-Davidson Motorcycle,* 508 F.2d 351 (9th Cir. 1974) (per curiam) (quoting *John Bacall Imports, Ltd. v. United States,* 412 F.2d 586, 588 (9th Cir. 1969); *see also Livonia Road,* 889 F.2d at 1265-66. Good is, however, entitled to the rents accrued during the illegal seizure of his home.

IV.

Other issues were briefed and argued on appeal and are found to be without merit. The district court is affirmed in all other respects. The case is remanded for a determination of when the DEA learned of the underlying violation and whether its subsequent actions complied with 19 U.S.C. §§ 1602-04. If the action is found to be timely, then summary judgement may be entered in favor of the government. If the action is untimely, then the case should be dismissed. In either instance, Good is entitled to the rents accrued on his home after seizure.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

NOONAN, Circuit Judge, concurring and dissenting:

I concur in all but Part II, as to which I dissent. In Part II, the court has converted a set of housekeeping rules for the government into statutory protection for the property of malefactors. Once property has been used in the commission of a narcotics offense it is subject to forfeit. 21 U.S.C. § 881(a). The government is free to claim the forfeiture any time after the offense is discovered. The only relevant restriction is the statute of limitations, which bars suit five years after the time of discovery. 19 U.S.C. § 1621.

The opinion of the court in Part II, in effect, creates a new statute of limitations. It also provides a new construction of a statute that has been in existence for almost seventy years and has been applied in a variety of contexts to customs offenses without any court ever giving the statute the application given in this case. The closest authority that the majority can find is dicta in a case that speaks of "due process implications" if a forfeiture were "brought against a property the owner of which already has been tried and acquitted." *United States v. Land Bldg. at 2 Burditt Street,* 924 F.2d 383, 386 (1st Cir. 1991). With all respect, these dicta are not authority for the surprising construction of the statute advanced here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

[Filed Sept. 26, 1990]

ORDER DENYING CLAIMANT JAMES GOOD'S MOTION TO EXCLUDE EVIDENCE AND GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On September 1, 1990, Claimant James Good's ("Good") Motion to Exclude Evidence was heard by this court. That Motion is in essence a motion to suppress evidence recovered from defendant property pursuant to a state search warrant executed at the defendant property on January 31, 1985. On the same date, Plaintiff's Motion to Strike Claim and for Summary Judgment was also considered.

Because the outcome of plaintiff's Motion for Summary Judgment will turn in part on this court's resolution of Claimant Good's Motion, this Motion will be discussed first. Claimant Good urges this court to exclude all evidence recovered as a result of the search, which evidence included over 87 pounds of marijuana, an Ohaus Triple Beam scale, vials containing hashish oil, and over $7,000 in U.S. currency on the grounds that the affidavit in support of the search warrant was defective because it failed to set forth sufficient probable cause for the search. Specifically, claimant Good contends that because the affidavit fails to indicate when the informants made their observations of drugs and drug paraphernalia on the defendant property, the information is stale.

The government argues that a time period of ten days is referenced in the affidavit and that the ten days refers to when the information was provided to the police officer-affiant, as well as when the informants made their observations. Plaintiff has filed a Declaration of Officer Kenneth Mathison, the state police officer who was the affiant for the state search warrant, which sets forth an explanation of the ten day reference as being the time period within which the informants provided the information. Furthermore, the government argues that the timing of the observations is not the only and dispositive factor in this case or in cases like this; there are other factors relating to reliability of the information which support a probable cause finding.

This court will look only to the four corners of the affidavit and will not consider any other explanation, reason or evidence not otherwise available to the state judge at the time he reviewed the affidavit and determined that there was probable cause. Accordingly, in deciding claimant's Motion, this Court will not consider Officer Mathison's Declaration.

Although the staleness of the information is a factor determining probable cause, it is not the controlling factor. *United States* v. *Dozier,* 844 F.2d 701 (9th Cir. 1988). The court finds other indicia of reliability within the affidavit. First, the presence of two, not just one confidential informants provides the corroboration which is indicative of reliability. Second, the detailed description of the property by the informants is another factor demonstrating reliability. Third, one of the informants had provided reliable information to the affiant on four previous occasions. Based on these other indicia of reliability, the court is satisfied that the state court judge could have concluded there was probable cause for the search based on the affidavit itself.

However, not withstanding the other indicia of reliability, the exact language of the affidavit itself could lead to a reasonable interpretation that the informants' observations occurred within the last ten days from the preparation of the affidavit. The second full paragraph of page two of the affidavit provides: "Your affiant was informed within the last ten days, the exact date and time not given to protect the identity of the citizen informant, that he had observed etc." In order for there to be a meaningful conclusion as to why the exact date and time had not been given, to protect the identity of the informant, the state judge could have reasonably concluded, that the ten day period refers to when the informant made his observations, not when the informant provided the information to the police officer. This interpretation is consistent with the need to prevent the informant's identity from being revealed to the occupants/owners of defendant property, as opposed to when the informant met with the police officer. In order for the language "to protect the identity of the informant," to be meaningful, the time when the informants observed the drugs and visited defendant property must be safeguarded, not the time when the informants met with the police. The state judge could have reasonably concluded that the informants were on the premises and made their observations within the last ten days and that the time period therefore referenced when they made their observations.

Furthermore, because marijuana cultivation is a crime of ongoing nature, the state judge could have concluded, and had probable cause to conclude that the instrumentalities, tools and other paraphernalia of such a large scale marijuana operation were likely to remain on the premises for long periods of time. *United States* v. *Dozier,* 844 F.2d 701 (9th Cir. 1988).

Because this court finds that the state court could have concluded there was probable cause to support the search based on the affidavit, Claimant's Motion to Exclude is denied. Based on this finding, this court need not reach the issue of whether this case comes within the "good faith exception" set forth in *United States* v. *Leon,* 468 U.S. 898 (1983).

Having denied Claimant Good's Motion, all evidence of the marijuana and drug paraphernalia recovered on defendant property is admitted and this Court is satisfied that based on the recovery of substantial amounts of drugs and drug instrumentalities sufficient probable cause that the defendant property was utilized to facilitate the commission of a violation of Title 21, U.S.C. § 841 has been established. Once the government has established probable cause, the burden shifts to Claimant Good to prove by a preponderance of the evidence that the subject property is not forfeitable. *United States* v. *$39,000.00 in Canadian Currency,* 801 F.2d 1210 (10th Cir. 1986). This showing can be made either by demonstrating (1) that the property was not used for unlawful purpose; or (2) that the claimant is an innocent owner, as defined in 21 U.S.C. § 881

(a)(7). This court is satisfied that the defendant property was used for illegal purpose based on the drugs and drug instrumentalities located within the property. With respect to the second showing, Claimant Good has himself admitted in responses to discovery, that he will not present evidence that he is an innocent owner. (See Good response to Interrogatory No. 21(2)).

More importantly, Claimant Good does not present any evidence of innocent ownership in opposition to the government's Motion for Summary Judgment. That being the case, the Court finds that Claimant Good has failed to meet his burden by a preponderance of the evidence. The plaintiff's Motion for Summary Judgment is granted. Accordingly, defendant property is hereby forfeited to plaintiff United States of America.

SO ORDERED.

DATED: Sep. 26, 1990, at Honolulu, Hawaii.

/s/ Harold M. Fong
HAROLD M. FONG
U.S. District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 89-00612 HMF

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PROPERTY TITLED IN THE NAME OF JAMES DANIEL GOOD, DESCRIBED IN TRANSFER CERTIFICATE OF TITLE NO. 249,207, TAX MAP KEY NO. 1-6-008-233(3), LOCATED AT KEAAU, DISTRICT OF PUNA, ISLAND AND COUNTY OF HAWAII, STATE OF HAWAII, TOGETHER WITH APPURTENANCES AND IMPROVEMENTS, DEFENDANT

[Filed Sept. 11, 1990]

ORDER DENYING CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

BACKGROUND

On January 31, 1985, Hawaii county police officers and an Internal Revenue Service agent executed a state search warrant on the defendant property and discovered marijuana and hashish oil. Claimant Good, the record title owner of the property, was charged by the state of Hawaii with promoting a detrimental drug in the second degree on June 4, 1985. On August 7, 1985, claimant pled guilty to the offense and was sentenced to one year in jail, a period of community service, and a $1,000.00 fine.

On August 8, 1989, four years after claimant was sentenced in the state court criminal action, the United States government filed the present civil forfeiture action, seeking to forfeit defendant real property located on the Big Island pursuant to 21 U.S.C. § 881(a)(7) on the grounds that the property was used to facilitate the promotion of a controlled substance in violation of 21 U.S.C. § 841 *et seq.*

The property was seized on August 21, 1989, pursuant to a seizure warrant issued by a United States magistrate on August 8, 1989. The magistrate found probable cause to issue the federal seizure warrant based on the evidence found during the 1985 search of the property by the state of Hawaii.

At the time of the arrest, the defendant property was being leased by claimant Good to tenants. The government allowed the tenants to remain on the property, but their rental payments were directed to be made to the government. The government offered to allow claimant Good to resume occupancy of the property as substitute custodian, but he was unable to do so because of a prior commitment to work abroad for a charitable organization. In addition to his motion for summary judgment, claimant moves the court for an order awarding him the rent collected by the government from the date of seizure to the present.

SUMMARY JUDGMENT STANDARD

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir. 1987), *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines,* 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Celotex,* 477 U.S. at 323, 106 S. Ct. at 2553. *But cf., id.,* 477 U.S. at 328, 106 S.Ct. at 2555-56 (White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage,* 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.,* 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.* 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim *implausible,* that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics,* 818 F.2d at 1468, *citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Insurance Co. of North America,* 815 F.2d 1285, 1289 (9th Cir. 1987), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the non-moving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*

DISCUSSION

In a civil forfeiture proceeding, the government bears the burden of going forward, and must establish probable cause that the property subject to forfeiture is involved in criminal activity. *Id.* at 1216; *United States v. $5,644,540.00 in U.S. Currency,* 799 F.2d 1357, 1362 (9th Cir. 1986). Probable cause means the government must have reasonable grounds to believe the property subject to forfeiture is related to an illegal drug transaction, supported by less than prima facie proof, but more than mere suspicion. *Id.* at 1362. The government must rely on sufficiently reliable information to warrant a reasonable belief that the property is subject to forfeiture. *United States v. Dickerson,* 873 F.2d 1181, 1185 (9th Cir. 1988). The government need not link the seized property to a particular narcotics transaction. *United States v. Four Million, Two Hundred and Fifty-Five Thousand,* 762 F.2d 895, 905 (11th Cir. 1985). Additionally, the government need not show that the evidence relied upon to establish probable cause is admissible pursuant to Fed. R. Civ. P. 56(e). *United States v. One 56-Foot Yacht Named Tahuna,* 702 F.2d 1276, 1283 (9th Cir. 1983).

Once probable cause is established, the burden shifts to the claimant to prove by a preponderance of the evidence that the subject property is not forfeitable.[1] *United States v. $39,000.00 in Canadian Currency,* 801 F.2d 1210, 1215 (10th Cir. 1986). To accomplish this, the claimant may show either (1) that the property was not used for an unlawful purpose, or (2) that such use was without the claimant's knowledge or consent. *U.S. v. All Right, Title & Interest,* 901 F.2d 288, 291 (2d Cir. 1990).

Claimant Good argues that even if the government has met its initial burden of showing probable cause,[2] he is entitled to judgment as a matter of law for the following reasons: (1) the forfeiture was not commenced in the timely fashion, (2) the shifting burdens of proof scheme under

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[1] Although the government may rely on hearsay and other inadmissible evidence to satisfy its initial burden of showing probable cause, once the burden shifts, the government cannot rely on inadmissible evidence. *Tahuna, supra* at 1283-84; *United States v. Property Known as 6109 Grubb Road,* 886 F.2d 618, 622 (3d Cir. 1989) (government's use of inadmissible deposition testimony improperly used to rebut claimant's innocent owner defense although allowable to establish probable cause).

[2] Claimant does not admit that the government has met its probable cause showing. On the contrary, claimant argues that if this court grants his motion to exclude evidence which is set for hearing on September 17, 1990, then the government will not be able to meet its burden of showing probable cause, and the property will have to be released. The court therefore postpones its ruling on probable cause until September 17, 1990.

the civil forfeiture statutes is unconstitutional, (3) this forfeiture action violates the double jeopardy clause of the Fifth Amendment to the United States Constitution, and (4) the lack of pre-seizure notice and a hearing in a civil forfeiture case violates the United States Constitution. For purposes of this motion, both claimant and the government agree that there are no disputed material issues of fact. Therefore, this court only concerns itself with the question whether claimant has demonstrated that he is entitled to judgment as a matter of law.

Timeliness of Filing this Civil Forfeiture Action

Claimant Good argues that the defendant property is not forfeitable because the government filed this forfeiture action in an untimely fashion, more than four years after the filing of criminal charges in state court against claimant, rather than promptly after charging claimant in the state court proceedings. The government argues that the applicable statute of limitations period is five years, and that therefore, this action was filed in a timely fashion. There is persuasive legal authority to support both positions.

Claimant does not dispute that there is a five-year statute of limitations period applicable to actions brought under 21 U.S.C. § 881(a)(7). Nonetheless, claimant argues that the government prosecuting a civil forfeiture action is still required to comply with the time constraints contained in 21 U.S.C. § 881(a)(7) and 19 U.S.C. § 1604, which may require commencement of the forfeiture action prior to the five year statute of limitations period.

Section 881(a)(7) of Title 21 of the United States Code provides for forfeiture of "[a]ll real property . . . *which is used, or intended to be used,* . . . to commit . . . a violation of this title . . ." Section 1604 of Title 19 requires the

Attorney General to immediately inquire into the facts of cases reported to him by customs officers, and "forthwith to cause the proper proceedings to be commenced and prosecuted, *without delay,* for . . . forfeiture . . ."

At least one judge on the Ninth Circuit Court of Appeals has interpreted section 881(a)(7)'s "used or intended to be used" language as requiring the initiation of the federal civil forfeiture action prior to termination of the state criminal proceeding. In *United States v. Tax Lot 1500,* 861 F.2d 232 (9th Cir. 1989), Judge Ferguson stated, in a short, one-page concurring opinion, that "federal forfeiture proceedings are timely commenced if initiated shortly after filing, but prior to termination, of state court criminal proceedings." *Id.* at 236.

The government argues that Judge Ferguson's concurrence should not be relied upon by this court in the instant case since the timeliness issue was not raised before the appellate court in the written briefs, but only in oral argument, and therefore, neither the government nor the Ninth Circuit had an adequate opportunity to brief this issue.

The government further argues that the applicable statute of limitations period is five years, and that since this action was commenced within four years of claimant Good's sentence, it was commenced in a timely fashion. Under 21 U.S.C. § 881(d), forfeiture proceedings under section 881 *et seq.* are governed by the procedures under the customs laws. Section 1621 of the customs statute provides:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced *within five years after the time when the alleged offense was discovered* . . .

19 U.S.C. § 1621.

This action was filed on August 8, 1989. The search of the defendant property giving rise to the state criminal proceeding and providing the magistrate with probable cause to issue the seizure warrant in the present case occurred on January 31, 1985. Therefore, this civil forfeiture action was brought within the requisite five year statute of limitations period.

The court recognizes that the government has greatly inconvenienced claimant in commencing this forfeiture action four years after claimant was sentenced. However, since the applicable statute of limitations period is five years, the government has not violated the statute of limitations by commencing the forfeiture action four years after sentencing. Accordingly, the court rejects claimant's untimeliness argument on the ground that the filing of the forfeiture action was within the applicable statute of limitations period.

Constitutionality of the Allocations of Burdens

Claimant Good argues that the scheme of shifting burens of proof under the civil forfeiture statutes, 19 U.S.C. § 1615 and 21 U.S.C. § 881(a)(7), is unconstitutional. Claimant also argues that the government in a civil forfeiture action should be required to prove its case beyond a reasonable doubt just as it must in criminal proceedings. Claimant admits that the United States Supreme Court has never ruled directly on the constitutionality of this burden of proof allocation.

The Ninth Circuit Court of appeals has upheld the scheme of shifting burdens against constitutional challenge. *United States v. One 1970 Pontiac GTO,* 529 F.2d 65, 66 (9th Cir. 1976). In fact, the First, Fourth, and Ninth Circuits have all found that this burden of proof allocation is constitutional. *United States v. Santoro,* 866

F.2d 1538, 1544 (4th Cir. 1989); *United States v. $250,000.00 in U.S. Currency,* 808 F.2d 895, 900 (1st Cir. 1987). Additionally, the Tenth Circuit Court of Appeals has held that the absence of the reasonable doubts standard in the civil forfeiture process does not violate due process. *Bramble v. Richardson,* 498 F.2d 968, 973 (10th Cir. 1974).

Since the Ninth Circuit Court of Appeals has already ruled on this issue, upholding the shifting of burdens scheme against constitutional challenge, the court rejects claimant's argument that the allocation of burdens in civil forfeiture actions violates the United States Constitution.

Double Jeopardy

Claimant argues that the prosecution of this civil forfeiture action violates the double jeopardy clause of the fifth amendment to the United States Constitution. Claimant Good relies primarily on *United States v. Halper,* 109 S.Ct. 1892 (1989), a recent case in which the United States Supreme Court held that the double jeopardy clause prohibits the government from imposing a civil sanction after criminal punishment for the same conduct if the civil sanction in the subsequent proceeding "bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word.

The court explained that a civil sanction is punishment if it "may not fairly be characterized as remedial, but only as a deterrent or retribution." *Id.* at 1902. The *Halper* court explained:

> [T]he government may not originally prosecute a defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole.

The court finds that the civil forfeiture statute at issue in this case was not intended to be punitive, but was intended to be remedial in nature. The legislative history of the civil forfeiture statutes suggests that the primary function of these statutes is to take away the instrumentalities necessary to execute drug crimes, a function that this court finds is remedial.

Additionally, the court finds this case markedly different from the *Halper* case. First, *Halper* was not a civil forfeiture action; it involved a false claims action. Second, *Halper* involved the same sovereign who was the prosecutor in the initial criminal prosecution, and also the plaintiff in the subsequent civil action. In this case, by contrast, the state of Hawaii was the first sovereign that prosecuted claimant in the state criminal proceeding. The United States government, a separate sovereign, has initiated the instant civil forfeiture action. Generally, double jeopardy does not attach when a person is criminally prosecuted by two diferent sovereigns even if the prosecution arises from the same set of facts. The same rule would appear to apply in this case.

The most important reason why this court is reluctant to find a double jeopardy violation is because of the enormous consequences such a ruling would have in the area of civil forfeiture law. If double jeopardy precludes civil forfeiture of a claimant's property after the claimant has been tried in a prior criminal proceeding, then most of the current civil forfeiture actions involving illegal drug activity would have to be dismissed. The court does not believe that Congress intended such a result when it passed the current civil forfeiture statutes. Accordingly, the court rejects claimant's double jeopardy argument.

Lack of a Pre-Seizure Hearing – Due Process

Claimant Good's final argument in support of his motion for summary judgment is that the lack of a pre-seizure in civil forfeiture cases violates the due process clause of the United States Constitution. Claimant Good relies on *United States v. Premises and Real Property at 4492 South Livonia Road,* 889 F.2d 1258 (2d Cir. 1989), a case in which the Second Circuit Court of Appeals held that 21 U.S.C. § 881(a)(7) was unconstitutional as applied when the government seized a person's home without giving the claimant the opportunity for a pre-seizure hearing.

The relevant case law appears to allow for seizure in civil forfeiture actions without pre-seizure notice and hearing. The Eighth and Ninth Circuit Courts of Appeals have held that due process does not require that pre-seizure notice and hearing be given in a civil forfeiture case. *United States v. One 1985 Cadillac Seville,* 866 F.2d 1142, 1147 (9th Cir. 1989); *United States v. One 1980 Red Ferrari,* 875 F.2d 186 (8th Cir. 1989). The court rejects claimant's due process challenge to the civil forfeiture statute.

As discussed above, claimant has filed to demonstrate that he is entitled to judgment as a matter of law. Accordingly, claimant's motion for summary judgment is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, Sept. 11, 1990.

/s/ Harold M. Fong

HARROLD M. FONG
United States District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law;

3. 21 U.S.C. 881 provides:

§ 881. Forfeitures

Subject property

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

> (1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
>
> (2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.
>
> (3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

> (4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that –
>
> (A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter 11 of this chapter.
>
> (B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and
>
> (C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.
>
> (5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation

of a felony provision of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 857 of this title).

(11) Any firearm (as defined in section 921 of Title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims; issuance of warrant authorizing seizure

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunctino or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or

(4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other laws and proceedings applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as

are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of forfeited property

(e)(1) Whenever property is civilly or criminally forfeited under this subchapter the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 1616a of Title 19, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell, by public sale or any other commercially feasible means, any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited per-

sonal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 2291 (h) of Title 22.

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this subchapter shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent.

Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A) except that, with respect to forfeitures conducted by the

Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of Title 39, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) will serve to encourage further cooperation between the recipient State or local agency and Federal law enforcement agencies.

Forfeiture and destruction of schedule I or II substances

(f)(1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter; all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this subchapter, all dangerous, toxic, or hazardous raw materials or products subject to forfeiture under subsection (a)(2) of this section; and any equipment or container subject to forfeiture under subsection (a)(2) or (3) of this section which cannot be separated safely from such raw materials or products under such circumstances as the Attorney General may deem necessary.

Plants

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

Vesting of title in United States

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

Stay of civil forfeiture proceedings

(i) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter, or a violation of State or local law that could have been charged under this subchapter or subchapter II of this chapter, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

Venue

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

Agreement between Attorney General and Postal Service for performance of functions

(*l*)[1] The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

4. 19 U.S.C. 1600-1610 and 1621 provide:

§ 1600. Application of the customs laws to other seizures by customs officers

The procedures set forth in sections 1602 through 1619[3] of this title shal apply to seizures of any property effected by customs officers under any law enforced or administered by the Customs Service unless such law specifies different procedures.

§ 1601, 1601a. Repealed. June 25, 1948, ch. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

§ 1602. Seizure; report to customs officer

It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred, and to turn over and deliver to such customs officer any vessel, vehicle, aircraft, merchandise, or baggage seized by him, and to report immediately to such customs officer every violation of the customs laws.

§ 1603. Seizure; warrants and reports

(a) Any property which is subject to forfeiture to the United States for violation of the customs laws and which is not subject to search and seizure in accordance with the provisions of section 1595 of this title, may be seized by the appropriate officer or person upon process issued in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure. This authority is in addition to any seizure authority otherwise provided by law.

(b) Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the

names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

§ 1604. Seizure; prosecution

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, the Attorney General decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

§ 1605. Seizure; custody; storage

All vessels, vehicles, aircraft, merchandise, and baggage seized under the provisions of the customs laws, or laws relating to the navigation, registering, enrolling or licensing, or entry or clearance, of vessels, unless otherwise provided by law, shall be placed and remain in the custody of the appropriate customs officer for the district in which the seizure was made to await disposition according to law.

Pending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient and appropriate with due

regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized; and storage of the property outside the judicial district or customs collection district in which it was seized shall in no way affect the jurisdiction of the court which would otherwise have jurisdiction over such property.

§ 1606. Seizure; appraisement

The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, aircraft, merchandise, or baggage seized under the customs laws.

§ 1607. Seizure; value $100,000 or less, prohibited merchandise, transporting conveyances

(a) If–

(1) the value of such seized vessel, vehicle, aircraft, merchandise, or baggage does not exceed $100,000;

(2) such seized merchandise is merchandise the importation of which is prohibited; or

(3) such seized vessel, vehicle, or aircraft was used to import, export, transport, or store any controlled substance;

the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. Written notice of seizure together with information on the applicable procedures shall be sent to each party who appears to have an interest in the seized article.

(b) As used in this section, the term "controlled substance" has the meaning given that term in section 802 of title 21.

§ 1608. Seizure; claims; judicial condemnation

Any person claiming such vessel, vehicle, aircraft, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $5,000 or 10 percent of the value of the claimed property, whichever is lower, but not less than $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

§ 1609. Seizure; summary forfeiture and sale

(a) In general

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, aircraft, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold or otherwise dispose of the same according to law, and shall deposit the proceeds of sale, after deducting the expenses described in section 1613 of this title, into the Customs Forfeiture Fund.

(b) Effect

A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to section 961 of title 46, Appendix, or any corresponding revision, consolidation, and enactment of such subsection in title 46) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.

§ 1610. Seizure; judicial forfeiture proceedings

If any vessel, vehicle, aircraft, merchandise, or baggage is not subject to section 1607 of this title, the appropriate customs officer shall transmit a report of the case, with the names of available witnesses, to the United States attorney for the district in which the seizure was made for the institution of the proper proceedings for the condemnation of such property.

* * * * *

§ 1621. Limitation of actions

No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs

~~customs~~ laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: *Provided,* That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed: *Provided further,* That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation.

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